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this Memorandum Decision shall not be
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collateral estoppel, or the law of the case.

PRO SE APPELLANT:

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**IN THE
COURT OF APPEALS OF INDIANA**

SAM C. COLLINS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 28A04-0603-PC-148

APPEAL FROM THE GREENE CIRCUIT COURT
The Honorable David K. Johnson, Judge
Cause No. 28C01-0410-PC-212

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Sam C. Collins (“Collins”) appeals the post-conviction court’s denial of his petition for post-conviction relief. Specifically, Collins argues that his appellate counsel was ineffective for: (1) failing to raise a double jeopardy argument regarding his theft and unlawful possession of a firearm by a serious violent felon convictions; (2) failing to raise a sentencing argument based on *Blakely v. Washington*, 542 U.S. 296 (2004); and (3) failing to adequately present an ineffective assistance of trial counsel claim on appeal regarding trial counsel’s failure to present evidence regarding contamination of the crime scene. Concluding Collins has waived these issues because he did not raise them in his petition for post-conviction relief, we affirm the post-conviction court’s denial of Collins’s petition for post-conviction relief.

Facts and Procedural History

The facts as reported in Collins’s direct appeal are as follows:

On August 27, 2002, Collins purchased a tan Ford LTD from Ronnie Edmonson. The following morning Collins and Mary Burns drove to Greg Alumbaugh’s residence. Alumbaugh is Collins’ former brother-in-law. Burns noticed a red bag in Collins’ car that had not been there the night before. Collins told Burns they needed gas for the car and that Alumbaugh was not home. Collins entered Alumbaugh’s garage and returned a short time later.

Collins and Burns continued driving until they reached the home of Mary Ellis. Ellis was in her home when she saw Collins and Burns pull into her driveway. Collins’ car was experiencing mechanical problems. Collins and Burns knocked on Ellis’ door seeking assistance. Ellis did not answer, so Burns walked to Roger Martin’s residence. Martin gave Collins a ride to Edmonson’s house while Burns stayed with the car.

Collins returned, and he and Burns began unloading items from Collins’ car into the vehicle of someone who brought Collins back to Ellis’ driveway. Ellis watched these events from her home. She saw Collins and

Burns load a red duffle bag, a black powder muzzle-loader firearm, a bow and arrow, and a propane tank into the second car. After they left the scene in the second car, Ellis called the sheriff's department.

Officers arrived at Edmonson's residence, where Collins and Burns had gone. Police Chief Rick VanHorn noticed a Sony Playstation and videogames in a red duffle bag, a hunting arrow on the ground, and a black powder muzzle-loader firearm in the cab of a truck. Collins initially claimed he owned the items, but then said he found them and was returning them to a friend. Apparently, Collins asked Burns to tell the police they had given a ride to a third person and all of the articles in the car belonged to that third person. Burns did so; however, she told the police that person's name was Steve, while Collins said his name was Scott.

An officer contacted Alumbaugh and asked him if he was missing any of the items in Collins' possession. Alumbaugh identified the .50 caliber black powder muzzle-loader firearm and accessories, Sony Playstation and videogames, red duffle bag, and bow and arrows as his property. Alumbaugh returned home to find the back door of his trailer unlocked and fresh pry marks on the door jamb. All of the items he previously identified were missing from his home.

Collins v. State, No. 28A04-0301-CR-38, slip op. at 1-3 (Ind. Ct. App. Nov. 25, 2003).

The State charged Collins with burglary, a Class B felony; theft, a Class D felony; and unlawful possession of a firearm by a serious violent felon, a Class B felony. The State also alleged that Collins was a habitual offender. Prior to trial, Collins filed a motion to bifurcate the trial on the serious violent felon charge, and the trial court granted the motion.

In late October 2002, a jury found Collins guilty of unlawful possession of a firearm by a serious violent felon. In November 2002, a jury found Collins guilty of burglary and theft and determined that he was a habitual offender. Thereafter, the trial court sentenced Collins to twenty years on his burglary conviction enhanced by twenty years for his habitual offender adjudication, three years on his theft conviction, and ten

years on his serious violent felon conviction. The trial court ordered the sentences on the burglary and serious violent felon convictions be served consecutively, resulting in an aggregate sentence of fifty years.

Collins filed a direct appeal and raised the following issues: (1) the trial court's exclusion of Collins's testimony during the serious violent felon proceeding; (2) the constitutionality of the serious violent felon statute; (3) the propriety of his habitual offender finding; and (4) ineffective assistance of trial counsel for failing to ask for a trifurcated trial and failing to object to the habitual offender finding. We affirmed Collins's convictions and sentence in an unpublished memorandum decision issued on November 25, 2003. *See Collins*, slip op. at 11.

On October 27, 2004, Collins, by counsel, filed a petition for post-conviction relief, in which he raised the following claims: (1) his convictions for theft and unlawful possession of a firearm by a serious violent felon violated the double jeopardy protections of the Indiana and United States Constitutions; (2) the trial court failed to articulate aggravating circumstances when enhancing his sentences and imposing consecutive sentences; and (3) appellate counsel was ineffective for failing to include a claim of ineffective assistance of trial counsel on the basis of trial counsel's failure to move for a bifurcated proceeding on the theft, burglary, and serious violent felon charges and failure to object to the order of trial.

The post-conviction court held a post-conviction hearing in September 2005. During the post-conviction hearing, Collins testified that he believed his appellate counsel was ineffective for failing to look at a deposition wherein the deponent testified

that the crime scene was contaminated. Collins's post-conviction attorney asked the post-conviction court to admit a copy of the deposition as Petitioner's Exhibit D, and the State objected on the basis that Collins had failed to raise that specific issue in his post-conviction petition. The post-conviction court initially allowed the admission of the exhibit on the basis that Collins would amend his post-conviction petition and provide the State an opportunity to respond. However, at the end of the post-conviction hearing, Collins's post-conviction attorney withdrew Exhibit D and stated that he would not amend the post-conviction petition because he could "not find legitimate grounds to introduce" Exhibit D in support of a claim of ineffective assistance of appellate counsel on the issue of contamination. Tr. p. 62. Thereafter, the post-conviction court issued an order denying Collins's petition for post-conviction relief on the three grounds raised in his post-conviction petition. Collins now appeals.

Discussion and Decision

Before addressing Collins's claims of error, we note the general standard under which we review the denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.*

We also note that the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Id.* In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

Collins argues that he was denied the effective assistance of appellate counsel because his appellate counsel: (1) failed to raise a double jeopardy argument regarding his theft and unlawful possession of a firearm by a serious violent felon convictions; (2) failed to raise a sentencing argument based on *Blakely v. Washington*; and (3) failed to adequately present an ineffective assistance of trial counsel claim on appeal regarding trial counsel’s failure to present evidence regarding contamination of the crime scene. The State argues that Collins has waived these three claims because he failed to raise these claims in his petition or an amended petition for post-conviction relief. We agree with the State.

Indiana Post-Conviction Rule 1(8) provides that “[a]ll grounds for relief available to a petitioner under this rule must be raised in his original petition.” “Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.” *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001). The failure to raise an alleged error in a post-conviction petition waives the right to raise that issue on appeal. *Koons v. State*, 771 N.E.2d 685, 691 (Ind. Ct. App. 2002), *trans. denied*.

Here, Collins raised the following claims in his post-conviction petition: (1) his convictions for theft and unlawful possession of a firearm by a serious violent felon violated the double jeopardy protections of the Indiana and United States Constitutions; (2) the trial court failed to articulate aggravating circumstances when enhancing his sentences and imposing consecutive sentences; and (3) appellate counsel was ineffective for failing to include a claim of ineffective assistance of trial counsel on the basis of trial counsel's failure to move for a bifurcated proceeding on the theft, burglary, and serious violent felon charges and failure to object to the order of trial. Collins did not allege the three grounds of ineffective assistance of appellate counsel in his post-conviction petition that he now raises in this appeal.¹ Because Collins failed to raise any of the three specific claims of ineffective assistance of appellate counsel in his post-conviction petition, such arguments are waived on appeal.

Affirmed.

SULLIVAN, Sr. J., and ROBB, J., concur.

¹ As noted above, Collins did not amend his post-conviction petition to include a claim of ineffective assistance of appellate counsel based on the crime scene contamination issue.